

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

APR 24 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0088
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JESSE GONZALEZ,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051253

Honorable Charles S. Sabalos, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Laura P. Chiasson

Tucson
Attorneys for Appellee

Wanda K. Day

Tucson
Attorney for Appellant

ESPINOSA, Judge.

¶1 After a jury trial, appellant Jesse Gonzalez was convicted of sexual assault and kidnapping. He was sentenced to presumptive, concurrent prison terms of seven and five years. On appeal, he claims the trial court erred when it precluded evidence that the victim

had previously been raped, precluded photographs of the victim in provocative poses, and allowed part of the victim's statement to a sheriff's deputy to be read to the jury. He also contends the Arizona Rape Shield Law, A.R.S. § 13-1421, is unconstitutional both on its face and as it was applied to him. For the reasons below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *See State v. Simpson*, 217 Ariz. 326, ¶ 2, 173 P.3d 1027, 1028 (App. 2007). In March 2005, the victim, C., was standing outside her home when a car occupied by Gonzalez and Jesse Olivas pulled into the driveway. C. and Olivas were friends, but C. did not know Gonzalez well. She got into the car, and the three drove to C.'s boyfriend's house. After several more stops, they drove to Olivas's home and went inside. Olivas's brother, Gilbert, was already in the home. Shortly after they arrived, Olivas left for work, and Gilbert went to his grandmother's home, which was located directly behind the Olivas home.

¶3 Once Gonzalez and C. were alone in the home, he forced her to perform oral sex on him. He then pulled her into the bathroom and raped her. C. stopped the assault by claiming falsely that she could see Gilbert returning home. She then went into the living room but was afraid to leave the home, in part because Gonzalez had told her he had a gun in his car. Gonzalez followed her into the living room and raped her again. During this third assault, Gilbert returned home, and C. ran out of the house to the home of a friend who lived

nearby. The friend drove C. to her home where a police officer happened to be outside on an unrelated matter, and C. reported the incident to him.

¶4 In August, Gonzalez was charged with three counts of sexual assault and one count of kidnapping, all class two felonies. At trial, Gonzalez admitted having had sexual contact with C. but claimed it had been consensual. He was convicted and sentenced as described above, and this appeal followed.¹

Prior Rape Allegations

¶5 Before trial, defense counsel learned that C. had previously been treated for mental illness and sought access to her psychiatric records. The trial court conducted an in camera examination of the records and released those it deemed relevant to the defense. One of those records showed that C. had told a mental health worker she had been “recently gang raped.” Defense counsel asserted that, if C. had been referring to the incident with Gonzalez, the statement should be admitted to impeach her account of what had occurred. The trial court withheld its ruling until it could question C. out of the presence of the jurors to determine if she had been referring to the incident with Gonzalez.

¶6 On the second day of the trial, C. told the trial court she had made the statement in November 2004, she had been referring to an incident that had occurred months before then, and the gang rape had “in no way involved” Gonzalez. Based on C.’s assertions, as

¹Gonzalez was also sentenced to 3.5 years’ imprisonment on an unrelated conviction for attempted sexual assault. The trial court ordered the sentences in this case served consecutively to that sentence.

well as on an independent examination of her psychiatric records, the trial court found the incident “took place long before the events disclosed by the evidence in this case. So there is no reason at this point for the Court to permit any testimony or any questioning about [it].”

¶7 Gonzalez contends the trial court erred by precluding evidence of the alleged gang rape, asserting that evidence C. had previously been raped was relevant to whether she had been “sending out an unclear message about whether she [was] consenting to sexual activity.” At trial, however, Gonzalez had argued only that evidence of the gang rape should be admitted if C. had been referring to the incident with him because her statement could be used to impeach her current account of the incident. We do not review evidentiary theories raised for the first time on appeal. *See State v. Doody*, 187 Ariz. 363, 375, 930 P.2d 440, 452 (App. 1996).

¶8 In any event, the sole issue at trial was whether C. had consented to sexual contact with Gonzalez. The fact that five months before the incident with Gonzalez she had told a mental health worker she had been “gang raped” was irrelevant to that issue. Indeed, evidence of a victim’s sexual history ““has little or no relationship to . . . her alleged consent to the intercourse.”” *State v. Castro*, 163 Ariz. 465, 469, 788 P.2d 1216, 1220 (App. 1989), *quoting State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 28, 545 P.2d 946, 952 (1976). Thus, we cannot say the trial court abused its discretion in finding the statement irrelevant. *See State v. McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d 931, 935 (App. 2007) (trial court’s ruling on admissibility of evidence reviewed for clear abuse of discretion).

¶9 Gonzalez next claims Arizona’s Rape Shield Law, A.R.S. § 13-1421, is unconstitutional on its face and as it was applied to him. Under that statute, evidence that a victim has previously claimed to have been raped is generally inadmissible unless those allegations of rape were false. § 13-1421(A)(5). Gonzalez argues that, because evidence of a victim’s past allegations of rape is inadmissible “absent a trial on each of the past instances . . . and a finding that each incidence was a false allegation,” a trial court is foreclosed from “even considering whether or not the proffered evidence was relevant and further, whether it was proven by any evidentiary standard.”

¶10 This claim is without merit for several reasons. First, Gonzalez did not raise this issue below and has therefore forfeited all but fundamental error review. *See State v. Carreon*, 210 Ariz. 54, n.13, 107 P.3d 900, 912 n.13 (2005). Second, the trial court did not rely on the rape shield statute in precluding the evidence in question; rather, it merely found the evidence was irrelevant and therefore precluded pursuant to Rule 402, Ariz. R. Evid. Accordingly, we need not address this issue further. *See State v. Lefevre*, 193 Ariz. 385, ¶ 16, 972 P.2d 1021, 1025 (App. 1998) (individual must suffer injury from statute to have standing to assert constitutional challenge). We note, however, that Division One of this court has previously considered a similar challenge and found the statute constitutional. *See State v. Gilfillan*, 196 Ariz. 396, ¶¶ 17-28, 998 P.2d 1069, 1074-77 (App. 2000).

¶11 Gonzalez also contends the trial court erred by precluding evidence that, following the assault, C. had told her friend that “[rape] happens to me all the time.”

Gonzalez, however, has not provided the required citation to the record indicating when the trial court made this ruling. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv), (vi). Nor does our own search of the record disclose that Gonzalez ever sought to have this evidence admitted or that the trial court specifically precluded it. We therefore do not address this claim further.

Provocative Photographs

¶12 Before trial, Gonzalez sought to admit provocative photographs of C. that had been taken after the assault. The trial court found they were irrelevant and precluded them. Gonzalez now contends the court erred in doing so because the photographs “were proof that [C.] had not been traumatized as she said she was from a sexual assault.”² We review the trial court’s ruling for an abuse of discretion. *See McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d at 935.

¶13 The photographs in question apparently depicted C. in various stages of undress. On the second day of the trial, C. told the trial court they had been taken with her permission by a third party, who was not closely associated with Gonzalez, a couple of months after the incident in question. We fail to see how the photographs have any bearing on whether C. had consented to sexual contact with Gonzalez months before the photos were taken, and we therefore cannot say the trial court abused its discretion in precluding them. It also seems clear that any relevance the photographs might conceivably have had was

²The state claims Gonzalez failed to raise this argument below, but we find the issue was properly raised.

outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury, *see* Ariz. R. Evid. 403, notwithstanding that the trial court did permit Gonzalez to introduce evidence of C.’s recent sexual partners.

Consistent Statements

¶14 During the trial, defense counsel read aloud to the jurors from a transcript of the statement C. had given to Sergeant Daniel Suden of the Pima County Sheriff’s Department. The state then called Suden as a witness and asked him to read the same portion of the transcript. The court allowed him to do so over defense counsel’s objection that the statement was inadmissible hearsay and cumulative.³ Gonzalez contends, for the same reasons, that the court erred in permitting Suden to read the statement, and claims prejudice because the admission of the hearsay evidence brought “the victim’s story in front of the jury twice” and “[t]his was significant to the outcome of the case because the only question the jury had to decide was whether they believed her or believed him.” We review the trial court’s decision for an abuse of discretion. *See McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d at 935.

¶15 Before Sergeant Suden read from the statement, defense counsel had himself read the statement to the jury. Thus, even had the trial court erred by permitting Suden to read the statement to the jurors again, there is little likelihood it could have had any effect

³We note the victim’s statement may have been admissible pursuant to Ariz. R. Evid. 801(d)(1)(B), as the state argues, but, for the reason stated above, we need not decide this issue.

on the verdict. *See State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012 (2000) (reversal of conviction not warranted absent reasonable probability that erroneously admitted evidence influenced verdict); *see also State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (“erroneous admission of evidence which was entirely cumulative constituted harmless error”). We find unpersuasive Gonzalez’s claim that the repetition of the victim’s statement caused the jury to find her more credible than him. Gonzalez did not testify in his defense and, on this record, did not put his own credibility at issue merely by introducing portions of his largely inculpatory, voluntary police interview. *Cf. State v. Byrd*, 109 Ariz. 387, 389, 509 P.2d 1034, 1036 (1973) (evidence of defendant’s other crimes admissible even though “defendant did not take the stand in his own behalf and his credibility was therefore not an issue”). Gonzalez has not demonstrated that the trial court abused its discretion in permitting the evidence.

Disposition

¶16 Gonzalez’s convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge